COMPETENCE-COMPETENCE IN CANADA: A BAROMETER OF COURT SUPPORT FOR COMMERCIAL ARBITRATION

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Abstract: The courts in Canada, its provinces and territories have all expressly adopted *competence-competence* in international commercial arbitration legislation. This adoption is consistent with broad and strong support for commercial arbitration as a vibrant alternative to litigation as a means of resolving domestic and international commercial disputes. The doctrine is further supported by arbitration statutes that require courts to stay litigation commenced in the face of arbitration agreements save for limited exceptions. Canada's courts have implemented positive effect *competence-competence* by empowering tribunals to determine (at least provisionally) their own jurisdiction, and negative effect *competence-competence* by requiring the remittance of jurisdiction questions to arbitral tribunals, subject to limited exceptions. By virtue of two Supreme Court of Canada (SCC) decisions, courts may (not shall) on a principled basis only make determinations of jurisdiction where the issues are questions of law alone (a very rare occurrence), or where the questions are of mixed fact and law that can be determined on the basis of a superficial review of the evidence, and provided that stay applications are not brought for improper delay purposes. Canadian legislation and courts thereby provide full support to international arbitration by deferring to arbitral tribunals, subject only to residual court discretion as prescribed in limited circumstances.

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I. INTRODUCTION

Commercial arbitration is a dispute resolution regime that is separate and apart from Canada's judicial system.[1] It is a free-standing and autonomous dispute resolution mechanism that derives from the contractual autonomy of parties to agree upon private means through which they will have their disputes finally determined without recourse to the courts. At the same time, arbitration does form part of Canada's overall justice system, and courts do retain significant roles in relation to several stages of the arbitral process, including support of ongoing arbitral proceedings, recognition and enforcement of arbitral awards, and the setting aside of awards on very limited grounds that do not relate to the legal correctness of the awards themselves.[2]

The promotion and viability of arbitration as an independent, autonomous and private process to resolve commercial disputes depends to a great extent upon a consistent and robust application of *competence-competence*, the principle that, simply put, permits arbitral tribunals to determine in first instance their own jurisdiction. While the obvious intention is that *competence-competence* should empower arbitral tribunals and minimize court intervention, the question naturally arises: to what extent should court intervention be minimized? While *competence-competence* as a principle is easily articulated, it has been implemented in different ways and to different degrees in different states, reflecting divergent views as to the appropriate balance between the respective roles of the courts and privately-appointed tribunals.

The critical issue of jurisdiction can arise at different stages of any arbitral process. Courts are called upon to determine jurisdiction when a party to a putative arbitration agreement initiates litigation in the face of that agreement. In that context, a defendant may apply to stay the court action, and the court will then have to either determine the issue or remit the question to be determined by the tribunal. Or, a plaintiff may itself seek a court declaration

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[1] See *Dell Computer Corp. v. Union des consommateurs*, 2007 SCC 34, at para 51 [*Dell*]; *Éditions Chouette (1987) inc. v. Desputeaux*, 2003 SCC 17 at para 41.

[2] In addition, courts hear appeals from awards in domestic arbitrations where agreed by the parties or in limited circumstances under domestic arbitration statutes.

that a putative arbitration agreement is either inoperative or of no application to the dispute. Second, in an arbitration that has already commenced, a tribunal may be asked to determine its own jurisdiction and, where it does make a positive finding of jurisdiction, a court may then be called upon to "decide the matter".[3] Further, a court may be asked to determine the jurisdiction of an arbitral tribunal after an award has been rendered, either on a set aside application or on an application to recognize and enforce an award. In these three situations, courts must determine an appropriate standard of review; i.e., whether such reviews should be conducted *de novo* and to what extent, if any, deference should be given to the jurisdiction decisions of tribunals in first instance.

Various types of jurisdictional questions can also arise. These include whether an arbitration agreement exists, whether non-signatories to an otherwise valid agreement are proper parties to an arbitration, whether a putative agreement is valid and enforceable, and whether a dispute submitted to arbitration lies within the scope of an otherwise valid and enforceable agreement.

As noted above, *competence-competence* is easily defined as the power given to arbitral tribunals to consider and determine their own jurisdiction.[4] This is typically described by arbitration scholars and practitioners as the "positive effect" of *competence-competence*. *Competence-competence* also has a negative effect; it can and often does preclude courts from making their own determinations on questions of jurisdiction. This negative effect should not, however, be misunderstood. *Competence-competence* in essence empowers arbitral tribunals to determine their own jurisdiction, but always subject to court review at some point in the arbitration process. It is on this important aspect of the doctrine that states differ in their approach. Some states (France and India being examples) impose severe limits on the availability of court recourse until after a tribunal has made its initial decision. Other states (for example, Sweden and China) take the opposite approach, affording their courts the power to determine jurisdictional issues at any time, including prior to any tribunal determinations.

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[3] Using the words of article 16 of the UNCITRAL Model Law on International Commercial Arbitration (the "Model Law").

[4] See J. Brian Casey, *Arbitration Law of Canada: Practice and Procedure*, (New York: Juris, 2017) at 199.

England and (as will be seen below) Canada, adopt a middle ground, permitting court determinations, but subject to specific conditions.[5] In the United States, the situation is somewhat confused because most states and the federal government have not adopted the Model Law or included *competence-competence* in their arbitrations statutes. There, the application of *competence-competence*, and the role that the courts play in determining jurisdictional issues, is dependent on caselaw and parties' adoption of institutional rules that typically incorporate the doctrine. In the absence of adoption of institutional rules, when dealing with the negative effect of *competence-competence*, courts draw distinctions between so-called questions of arbitrability (in which the existence and validity of arbitration agreements are primarily for the courts) and procedural and scope issues (in respect of which the courts defer to arbitrators).[6]

An absolute application of *competence-competence* would force all issues of jurisdiction to tribunals, preclude court determinations at the onset of arbitration and require courts to defer to tribunal decisions on all issues of jurisdiction, at least until judicial review or enforcement proceedings. This view would, in effect, presume that all efforts to avoid arbitration, at least at the outset, are obstructionist- intended to delay or frustrate arbitrations in the face of otherwise valid and enforceable agreements. On the other hand, a restrictive interpretation of *competence-competence* would unduly limit or negate the ability of tribunals to fulfill an important part of their mandate and render nugatory the express provisions of the Model Law and institutional rules that provide that same power to tribunals under their auspices.

While the clear and ostensible purpose of *competence-competence* is to shift the power equilibrium away from courts in favour of arbitral tribunals, a proper application of the doctrine requires a consideration of balances to be drawn between requiring parties to adhere to agreements that they have freely-made, the purported

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[5] See Gary B. Born, *International Commercial Arbitration*, (The Netherlands: Kluwer Law International, 2014) at 1049.

[6] See John J. Barcelo III, "Who Decides the Arbitrators' Jurisdiction? Separability and Competence-Competence in Transnational Perspective" (2003) 36 Vand J Transnat'l L 1115 at 1131-1134; Nigel Blackaby & Constantine Partasides, *Redfern and Hunter on International Arbitration* (Oxford: Oxford University Press, 2015) at ss 5.126 and 5.127.

right of parties to have timely and efficient access to the courts, the costs associated with arbitrations that may ultimately produce unenforceable awards and the costs associated with obstructive court proceedings. As observed by one scholar:

> But of course arbitration is not the holy grail. Not all parties resisting arbitration are obstructionists. A party should be entitled to its day in court unless it has agreed to arbitrate. That is the competing value. A legal order must decide what weight to give to these competing values and how to structure the process to maximize overall value by reducing opportunities for obstructionism while preserving legitimate claims for reasonably prompt judicial decision. The doctrine of separability and competence-competence operate at this tension point in a legal order.[7]

This article reviews how *competence-competence* has been accepted and applied by Canada's courts at the outset of arbitrations, when courts are called upon to rule on jurisdictional issues on stay applications. The courts' treatment of *competence-competence* is consistent with an overarching and strong support for commercial arbitration as a matter of public policy. The argument made is that our courts have given proper effect to the principles and objectives that underlie *competence-competence*, striking an appropriate balance between arbitral and court power that recognizes and supports the use of arbitration consistent with party autonomy and access to the courts' adjudications when and to the extent necessary.

II. CANADIAN LEGISLATIVE FOUNDATION FOR *COMPETENCE-COMPETENCE*

As a starting point, it should be noted that all Canadian international commercial arbitration legislation (and almost all domestic commercial arbitration legislation) expressly recognizes and adopts both positive and negative effects of *competence-competence*.

Canada was a relative latecomer to commercial arbitration. Historically, Canada's provinces and territories had arbitration

[7] See Barcelo, *supra* note 6 at 1119.

legislation modeled after the English *Arbitration Act*, 1889,[8] a statute that retained the vestiges of earlier law that permitted a significant degree of court intervention and control over arbitration. Canada and its provinces were, however, early adopters of the New York Convention[9] and, with the promulgation and Canada's adoption of the Model Law, the use of arbitration in Canada grew exponentially, particularly over the last twenty years. This growth has been described as the "big bang of arbitration in Canada", a development that caused Canadian courts to "throw aside past resistance by courts to defer to arbitration agreements".[10]

For statutory purposes, all of Canada's provinces and territories distinguish between international and domestic commercial arbitration,[11] and all jurisdictions save for Quebec and the federal government itself, have enacted separate statutes for each. On the domestic side, British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, New Brunswick and Nova Scotia reformed their arbitration acts following the issuance of the Model Law, and those acts all draw important precepts from that instrument, with some reservations thought to be necessary for domestic arbitration. The arbitration provisions of Quebec's *Code of Civil Procedure* are to the same effect. The salient feature of all of these acts is the express adoption of *competence-competence* in language very similar to that of article 16 of the Model Law.[12] Similarly, all domestic statutes contain provisions that require courts to stay court proceedings launched in the face of arbitration agreements.[13]

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[8] 52 & 53 Vict. C. 49.

[9] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, adopted by the United Nations Conference on June 10, 1958.

[10] See Cecil O.D. Branson, "The Enforcement of International Commercial Arbitration Agreements in Canada" (2000) 16:1 Arb Int'l 19 at 23.

[11] Adopting the definition of international arbitration set out in articles 1(3) and (4) of the Model Law.

[12] See *Arbitration Act*, SO 1991, c 17, s 17; *Arbitration Act*, RSA 2000, c A-43, s 17; *Arbitration Act*, SS 1992, c A-24.1, s 18; *Arbitration Act*, CCSM 1997, c A120, s 17; Art 620 CCP; *Commercial Arbitration Act*, SNS 1999, c 5, s 19; *Arbitration Act*, RNSB 2014, c 100, s 17; *Arbitration Act*, RSBC 1996, c 55, s 22 read together with Rule 22(2) of the BCICAC Rules; Art 632 CCP.

[13] See, for example, section 7 of Ontario's domestic *Arbitration Act*, SO 1991, c 17. It should be noted that while the domestic statutory stay provisions are consistent

On the international side, all of Canada's provinces have adopted the New York Convention and all have adopted the Model Law, by incorporation of that instrument into international commercial arbitration statutes or, as in British Columbia and Quebec, by using statutory language that mirrors the Model Law.[14]

At the federal level, Parliament in 1986 enacted in the *Commercial Arbitration Act*[15] by which the Model Law, re-titled the Commercial Arbitration Code, was adopted in its entirety for use in all commercial arbitrations, whether domestic or international, conducted under the auspices of federal legislation. The Commercial Arbitration Code applies only to matters where at least one of the parties to the arbitration is the Crown in right of Canada, a departmental corporation, or a Crown corporation, or in relation to maritime or admiralty matters. Significantly for international arbitration purposes, "commercial arbitration" under the federal Act includes claims made under the North American Free Trade Agreement and free trade agreements made between Canada and several specifically-enumerated states.[16]

The effect of the foregoing is that, for international arbitrations, articles 8 (stay of court proceedings), 16 (*competence-competence*), 34 (set aside of awards) and 35 (recognition and enforcement) of the Model Law are adopted in all Canadian jurisdictions, and that

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with the Model Law by requiring courts to stay litigation subject to limited exceptions, the stated exceptions are slightly broader than those stated in article 6 of the Model Law. For this reason, domestic stay application cases should be read with some caution when considering international jurisdiction issues.

[14] See *International Commercial Arbitration Act*, SO 2017, c 2, sched 5; *International Commercial Arbitration Act*, RSNS 1989, c 234; *International Commercial Arbitration Act*, RSPEI 1988, c I-5; *International Commercial Arbitration Act*, RSA 2000 c I-15; *International Commercial Arbitration Act*, RSNB 2011, c 176; *International Commercial Arbitration Act*, CCSM 1986, c C151; *International Commercial Arbitration Act*, SS 1988-89, c I-10.2; *International Commercial Arbitration Act*, RSA 2000, c I-5; *International Commercial Arbitration Act*, RSBC 1996, c 233. Although not relevant to this paper, it should be noted that only Ontario and British Columbia have adopted the 2006 version of the Model Law. The other provinces are expected to follow suit.

[15] *Commercial Arbitration Act*, RSC 1985, c 17 (2nd Supp).

[16] See *ibid*, s 5(4).

for domestic arbitrations seated in most provinces,[17] the same principles apply, subject to some exceptions expressed in the domestic acts. For this reason, domestic arbitration cases on jurisdictional issues are instructive on Canada's approach to *competence-competence*.[18]

III. *COMPETENCE-COMPETENCE* IN CANADA

It is worthy of mention that the principle underlying *competence-competence* was recognized in Canada well prior to adoption of the Model Law. As early as 1918, the SCC in *Stokes-Stephens Oil Co. v. McNaught*,[19] faced with a broadly-drafted arbitration clause, ruled that once the court determined that the claim was not "clearly outside" the purview of the arbitration clause, the question of arbitrability of specific claims relating to an oil-drilling contract should be determined by the arbitral tribunal, consistent with the express broad scope terms of that clause. On this point Anglin J wrote:

> Once the conclusion is reached that the agreement for arbitration is wide enough to embrace the claims presented in the action it is the *prima facie* duty of the court to allow the agreement to govern … and the onus of shewing that the case is not a fit one for arbitration is thrown on the person opposing the stay of proceedings. …

Nonetheless, it was the case that, prior to the modernization of Canadian arbitration statutes after promulgation of the Model Law in 1985, Canadian courts operated within a legislative framework that permitted court interference in or superiority over arbitrations.

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[17] The exceptions being Newfoundland and Labrador, Prince Edward Island, and the territories (Yukon, Nunavut and the Northwest territories).

[18] There is one important distinction that must be made between the international arbitration legislation of Ontario and British Columbia on the one hand, and the other provinces, territories and the federal code on the other. In Ontario and British Columbia, the Model Law has been modified to permit judicial review of both positive and negative determinations of jurisdiction under article 16. It is expected that the federal government, the other provinces and the territories will ultimately follow suit as they adopt the 2006 version of the Model Law.

[19] *Stokes-Stephens Oil Co. v. McNaught*, [1918] 57 SCR 549.

This legislation was typified by stay provisions that allowed (but did not require) courts to stay litigation commenced in the face of arbitration agreements if satisfied that there were no sufficient reasons not to refer matters to arbitration and if satisfied that a party applying for a stay remained ready, willing and able to do all things necessary to arbitrate.

While the body of post-Model Law Canadian caselaw was, prior to the SCC's 2007 watershed decision in *Dell*,[20] limited and mixed, it can generally be stated that the weight of authority was that courts did apply *competence-competence* by deferring to arbitral tribunals where the issues in dispute were *prima facie* or "arguably" within the scope of the enforceable arbitration agreements. For example, in *Gulf Canada Resources Ltd. v. Arochem International Ltd.*[21] issues were raised as to whether certain claims were within the scope of an arbitration and as to whether an arbitration respondent was a party to the arbitration agreement. The British Columbia Court of Appeal accepted that while it did retain discretion to refuse a stay of court proceedings, that discretion was, under Model Law-based legislation, very limited. Decisions as to the scope of arbitration agreements and as to whether a particular party is a proper arbitration party should be resolved by the arbitral tribunal unless it is clear or inarguable that the dispute is outside the terms of the agreement or that the party is not privy to that agreement. This same approach was adopted in other Canadian cases, most notably by the Ontario Court of Appeal in *Dalimpex Ltd. v. Janicki*.[22]

Equally, the generally-accepted view was that court applications to review preliminary tribunal jurisdictional decisions under article 16(3) of the Model Law or their domestic arbitration equivalents would not be heard *de novo*. For example, in *Ace*

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[20] *Supra*, note 1. This article serves as a useful review the relevant caselaw on these issues in Canada prior to 2000.

[21] *Gulf Canada Resources Ltd. v. Arochem International Ltd.*, [1992] 66 BCLR (2d) 113, 32 ACWS (3d) 197.

[22] *Dalimpex Ltd. v. Janicki* [2003] 64 OR (3d) 737, 123 ACWS (3d) 217 [*Dalimpex*]. See *CIBC Mortgage Corp. v. Rowatt*, [2003] 61 OR (3d) 737, 117 ACWS (3d) 750; see also, *NetSys Technology Group AB v. Open Text Corp.* [1999] 1 BCLR (3d) 307, 92 ACWS (3d) 583.

Bermuda Insurance Ltd. v. Allianz Insurance Company of Canada,[23] a tribunal seated in Alberta decided that it had jurisdiction to hear claims notwithstanding an agreement that arguably provided for arbitration in England. The court explicitly rejected an argument that article 16(3) required a full re-hearing and dismissed the application using a standard of "reasonableness, deference & respect", consistent with need for predictability in international arbitration and to preserve the autonomy of the arbitration forum selected by the parties.[24]

This is not to say, however, that there were no aberrant decisions. In *Finkelstein v. Bisk*,[25] for example, a motion judge dismissed a stay application in the face of an alleged oral arbitration agreement. On appeal from that decision, the Ontario Court of Appeal acknowledged that the judge had the *discretion* to remit the issue of the existence of the arbitration agreement to the arbitrator but ruled that she had not erred in principle in deciding that issue herself. The appeal court noted, in this regard, that the existence of the arbitration agreement "did not turn on any matter with respect to which the arbitrator had special expertise or some other advantage over the motion judge", applying a criterion that effectively negated the *competence-competence* principle contrary to Ontario's domestic arbitration statute.[26] Given decisions of this ilk, it could not be said that Canadian courts would predictably and consistently apply *competence-competence* as an important means of supporting commercial arbitration.

With the SCC decision in *Dell*, 2007 was a watershed year for Canadian caselaw on *competence-competence*. Policy statements in that case made it clear that arbitration would have the full support, as a matter of public policy, of Canadian courts. In this case, the defendant in a proposed class proceeding sought to stay

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[23] *Ace Bermuda Insurance Ltd. v. Allianz Insurance Company of Canada*, 2005 ABQB 975.

[24] Relying principally on *The United Mexican States v. Metalclad Corp*. 2001 BCSC 664. It should be noted that issues relating to the standard of review of interim jurisdictional determinations are beyond the scope of this paper and that that issue is regretfully not yet fully settled in Canadian jurisprudence.

[25] *Finkelstein v. Bisk*, [2004] 191 OAC 166, 134 ACWS (3d) 755 [*Finkelstein*].

[26] See *ibid* at para 6.

that action in favour of arbitration pursuant to an arbitration clause contained within web-based terms and conditions of sale of computer equipment. The class representative plaintiff argued, *inter alia*, that he had never agreed to arbitration because that dispute resolution process was not brought to his specific attention. Justice Deschamps speaking for the majority in dismissing the stay application, took note of what she described as the discrepant "court interventionist" and "arbitration precedence" approaches to *competence-competence* and jurisdictional determinations and accepted that by virtue of earlier caselaw, Canada had adopted the so-called *prima facie* test, which test, she further wrote, was increasingly gaining acceptance in most of the world.[27] Justice Deschamps then proceeded to articulate the following protocol for determining whether jurisdiction questions would be determined by arbitral tribunals or by the courts:[28]

> First of all, I would lay down *a general rule that in any case involving an arbitration clause, a challenge to the arbitrator's jurisdiction must be resolved first by the arbitrator. A court should depart from the rule of systematic referral to arbitration only if the challenge to the arbitrator's jurisdiction is based solely on a question of law*. This exception is justified by the courts' expertise in resolving such questions, by the fact that the court is the forum to which the parties apply first when requesting referral and by the rule that an arbitrator's decision regarding his or her jurisdiction can be reviewed by a court. It allows a legal argument relating to the arbitrator's jurisdiction to be resolved once and for all, and also allows the parties to avoid duplication of a strictly legal debate. In addition, the danger that a party will obstruct the process by manipulating procedural rules will be reduced, since the court must not, in ruling on the arbitrator's jurisdiction, consider the facts leading to the application of the arbitration clause.
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> *If the challenge requires the production and review of factual evidence, the court should normally refer*

[27] See *Dell*, *supra* note 1 at para 83.

[28] *Ibid* at paras 84-86.

> *the case to arbitration, as arbitrators have, for this purpose, the same resources and expertise as courts. Where questions of mixed law and fact are concerned, the court hearing the referral application must refer the case to arbitration unless the questions of fact require only superficial consideration of the documentary evidence in the record.*
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> Before departing from the general rule of referral, the court must be satisfied that the challenge to the arbitrator's jurisdiction is not a delaying tactic and that it will not unduly impair the conduct of the arbitration proceeding. This means that even when considering one of the exceptions, the court might decide that to allow the arbitrator to rule first on his or her competence would be best for the arbitration process. (emphasis added)

Dell was decided on the basis of Quebec Civil Law. Any doubt that the same test and principles would apply in the common law was provinces was dispelled by the 2011 SCC decision in *Seidel v. Telus Communications Inc.*[29] In that case, the defendant in a proposed class proceeding moved to stay that action in favour of arbitration pursuant to arbitration agreements contained in individual cellular telephone service contracts. In the result, the Court stayed all claims except certain claims that were reserved to the courts by consumer protection legislation. This decision was made with Justice Binnie writing that "the virtues of commercial arbitration have been recognized and indeed welcomed by our Court".[30] In her dissenting reasons, LeBel J (who would have stayed all claims, and whose reasons on this issue were accepted by the majority) wrote:[31]

> A British Columbia court must grant a stay of proceedings unless it concludes that the arbitration agreement is "void, inoperative or incapable of being performed". However, the fact that a court can rule

[29] *Seidel v. TELUS Communications Inc.*, 2011 SCC 15 [*Seidel*].

[30] See *ibid* at para 23.

[31] *Ibid* at paras 113-120.

> on its jurisdiction does not mean that it is required to do so. An argument that an arbitration agreement is void, inoperative or incapable of being performed constitutes a direct challenge to the arbitrator's authority to consider and resolve the dispute. In *Dell*, both the majority and the minority had to decide whether the arbitrator or the court should rule first on the validity and applicability of the agreement, and they also discussed, by extension, the type of review the court should conduct to determine whether the agreement is "void, inoperative or incapable of being performed".
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> This requirement of deference to the arbitrator's jurisdiction is related directly to the role of the court that must, in considering an application for a stay of proceedings, determine whether the agreement is "void, inoperative or incapable of being performed". Given that the general rule is that arbitrators should be the first to consider challenges to their jurisdiction, the expressions "void", "inoperative" and "incapable of being performed" should be interpreted narrowly. There appears in fact to be a consensus to this effect in the authorities on all three of these criteria. See, e.g., *Kaverit Steel and Crane Ltd. v. Kone Corp*. (1992), 87 D.L.R. (4th) 129 (Alta. C.A.), *per* Kerans J.A. (in which it was held, at p. 138, that an arbitration agreement is not "inoperative" merely because a reference to arbitration might be "inconvenient); *Mind Star Toys Inc. v. Samsung Co.* (1992), 9 O.R. (3d) 374 (Gen. Div.) (in which it was held that an arbitration agreement is not null and void merely because a claim of fundamental breach is made); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974), *per* Stewart J. (in which it was held that if the *forum conveniens* test for jurisdiction were to be considered in determining whether an arbitration agreement was valid, it would almost always result in a finding against arbitration); M. J. Mustill and S. C. Boyd, *The Law and Practice of Commercial Arbitration in England* (2nd ed. 1989), at p. 465 (in which the authors write

> that "'[i]ncapable of being performed' connotes something more than mere difficulty or inconvenience or delay in performing the arbitration"); and McEwan and Herbst, at pp. 3-63 ff.). The British Columbia Court of Appeal even appeared to endorse this view in *MacKinnon 2004* (para. 36).
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> In *Dell*, this Court interpreted an express legislative direction that arbitrators are to consider the scope of their own jurisdiction, coupled with the use of language similar to that of the New York Convention and the Model Law, as amounting to incorporation of the competence-competence principle into Quebec law. Courts should therefore be mindful to avoid an interpretation that makes it possible to sidestep the competence-competence principle and turns the Convention's "inoperative" exception into a back door for a party wanting to "escape" the agreement.
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> In considering a statutory provision containing the language contemplated by *Dell* and based on that of the New York Convention and the Model Law, the British Columbia Court of Appeal accepted and endorsed the modern approach according to which arbitration is acceptable in commercial matters. It recognized that the competence-competence principle is part of the province's law. It did not err in doing so.

Thus, the approach adopted by the SCC may fairly be described as tilted in favour of deference to arbitration, but with residual court discretion in prescribed limited instances: where the issue is based solely on a question of law, or one of mixed fact and law where the question can be determined on a superficial review of the evidence.

This is decidedly more nuanced and flexible than in some other states. In France, for example, a court may only consider whether there is *prima facie* evidence of an arbitration agreement if an arbitration has not yet been commenced. A French court can only consider whether an arbitration agreement is "patently void" if it is asked to provide assistance to the arbitral process by appointing an arbitrator. Once that happens, parties will be referred

to arbitration without any court consideration into the existence, validity or scope of an arbitration agreement. Moreover, under articles 1448(1) and 1455 of that country's *Code of Civil Procedure*, courts are precluded from accepting jurisdiction after arbitrations commence unless the arbitration agreements are manifestly void or manifestly not applicable.[32]

The Supreme Court's decision in *Dell* was not received without some controversy. Arbitration scholar (and now Québec Superior Court judge) Frédéric Bachand, in particular, criticized the Court for having adopted a "lukewarm" approach to the negative aspect of *competence-competence*. In his view, the Court erred by creating a discretionary role that did not previously exist (save for instances where the *prima facie* test described in pre-2007 decisions was not met). Succinctly stated, Professor Bachand questioned the Court's assumption that judges are better-placed to determine pure questions of law. In his view, it could be equally argued that arbitrators with expertise would be better placed to determine legal issues relating to their own areas of expertise and better placed to deal with arbitration law than judges unfamiliar with arbitration law and precepts. He also argued that even on questions of law alone, judges would be better placed to rule on jurisdiction after having received the benefit of the arbitrator's own views. Professor Bachand further expressed concern that the discretion given to the courts by *Dell* would create inconsistencies in court decisions and delay that would reward recalcitrant parties. Notwithstanding these critiques, Professor Bachand did conclude (rightly in my view) that Canadian court decisions show "a real and sincere commitment on the part of the judiciary to make arbitration work" and a "clear pro-arbitration message that confirms that Canadian courts have, generally speaking, abandoned the reluctance and suspicion towards arbitration that characterized their earlier jurisprudence".[33]

The questions that arise from *Dell* and *Seidel* are, has the Court undermined *competence-competence* by: (i) permitting judges to pronounce upon jurisdiction issues that are sole questions of law;

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[32] See *supra* note 5 at 1113.

[33] See Frederic Bachand, "*Kompetenz-Kompetenz*, Canadian Style", (2009) 25:3 Arb Int'l 431 at 434-438, 453.

or, (ii) allowing judges to make such determinations on questions of mixed fact and law where they can do so based on a superficial review of the evidence. In my view, the answer to both questions is emphatically no.

As to the first question, it must be noted that most of the cases turn on the contractual interpretation of arbitration agreements or arbitration clauses within commercial agreements. When *Dell* and *Seidel* were decided, there was an abundance of confusing and inconsistent caselaw on the characterization of contractual interpretation issues as either "questions of law" or "questions of mixed fact and law". Happily, with the 2014 SCC decision in *Sattva Capital Corp. v. Creston Moly Corp*.,[34] this is no longer the case. There, in determining that the arbitral award in issue could not be appealed under domestic arbitration legislation, the Court ruled that, as a general and overriding rule, contractual interpretation involves questions of mixed fact and law as it requires the application of legal principles applied to the contractual words considered in the light of the factual context within which contracts are made. It will only be in rare and exceptional circumstances that courts should identify extricable questions of law in construing contracts. With this governing principle, it should be a rare occurrence that a court would be called upon to decide a jurisdictional issue as a question of law alone. This is exemplified by the Ontario Court of Appeal decision in *Dancap Productions Inc. v. Key Brands Entertainment*, where Sharpe JA wrote:[35]

> In my view, this is not a case where it is clear or obvious that the dispute between the parties is not governed by the arbitration clause. The determination of the scope of the ARA and the arbitration clause will require a thorough review of the parties' complex contractual discussions, understandings, expectations and arrangements, an inquiry that clearly calls for much more than a "superficial consideration of the documentary evidence in the record." I conclude, therefore, that on this record, the motion judge erred

[34] *Creston Moly Corp. v. Sattva Capital Corp.* 2014 SCC 53.

[35] *Dancap Productions Inc. v. Key Brand Entertainment Inc.*, 2009 ONCA 135 at para 40 [*Dancap*].

> in refusing to stay Dancap's action on account of the arbitration clause.

To be sure, there is some merit in Professor Bachand's view that it should not be assumed that judges are better placed to determine questions of law alone and that arbitrators with particular expertise on the subject-matters of their arbitrations and on arbitral may be better placed to determine such questions. The fact remains, however, that the quality and correctness of any such determination will always be a function of the particular arbitrators selected by the parties, the knowledge, experience and skill of lawyers arguing the matters, and the quality of the particular judges before whom the questions are argued. It certainly cannot be presumed that arbitrators will be better placed than judges to make these determinations, or that there will always be some value in having the views of arbitrators available to the courts whenever jurisdictional issues are argued by way of judicial review. The value of having judges determining in first instance jurisdictional issues that are questions of law alone cannot be doubted if the parties' objectives are to have such determinations made as early and as efficiently as possible in the arbitral process. This will certainly be the case if such matters are before the courts prior to the constitution of the arbitral tribunals.

As to the second question, and as noted above, courts before 2007 adopted the principle that if a matter was *prima facie* (or "arguably") within the scope of an arbitration agreement, or if there was a *prima facie* (or arguable) argument in favour of the existence of a valid and binding arbitration agreement, questions of jurisdiction should be remitted to arbitrators for initial determinations. The *Dell* and *Seidel* Courts believed that they were implementing and providing clarity to that guiding principle, and they did so by articulating the principle in the context of public policy support for arbitration. While again there is some merit to Professor Bachand's concern that application of the discretion suggested by the *Dell* Court can produce inconsistent results and reward recalcitrant or obstructionist parties, the very same concerns would be equally valid under the caselaw that pre-dated *Dell*. Indeed, permitting (not mandating) courts to determine jurisdictional questions of mixed fact and law only where they can be determined on a superficial review of the evidence does, in fact, provide clarity to and does not expand upon the prior *prima facie* or "arguable" test.

Whether the determining criterion is "arguable" on the one hand, or "superficial review of the evidence" on the other, the result in any given case would likely be the same. By placing the test within a context of broad support for commercial arbitration, as to questions of mixed fact and law, *Dell* and *Seidel* have affirmed and clarified earlier caselaw and not expanded court discretion to determine jurisdictional issues without first remitting same to arbitral tribunals.

The foregoing observations are validated by the cases decided after *Dell* and *Seidel*. Those two cases have not, in fact, undermined the application of *competence-competence* in Canada. To the contrary, properly briefed courts ubiquitously and routinely refer to those two cases as preliminary steps in their analysis of the merits of stay applications. In the majority of such cases, jurisdictional issues are in fact remitted to arbitral tribunals for initial determinations. *Dancap*, cited above, which was decided after *Dell* but before *Seidel*, is a case on point.

There are, of course, other examples. In *Ciano Trading & Services C.T. v. Skylink Aviation Inc.*[36] a plaintiff resisting a stay of its court action argued that the scope of arbitration agreement in issue was limited to breach of contract claims and that the arbitral tribunal had no jurisdiction to determine fraud and misrepresentation claims. The Ontario Court of Appeal applied *competence-competence*, ruling that it was unclear that fraud and misrepresentation claims were not arbitrable under the parties' agreement; that decision was left for determination by the arbitral tribunal.

Similarly, in *Muskrat Falls Corporation v. Astaldi Canada Inc.*[37] the Newfoundland Supreme Court ruled that interpretation of the scope of the arbitration agreement in issue was a question of mixed fact and law that was not determinable on a superficial review of the evidence. Hence, the matter was remitted to the arbitrators for determination. The Ontario Superior Court's decision in *Nordion Inc. v. Life Technologies Inc.*[38] is to the same effect.

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[36] *Ciano Trading & Services C.T. v. Skylink Aviation Inc.*, 2015 ONCA 89.

[37] *Muskrat Falls Corporation v. Astaldi Canada Inc.*, 2018 NLSC 210.

[38] 2015 ONSC 99 (CanLII).

As a final example, in *Harrison v. UBS Holding Canada Ltd.*,[39] the arbitration clause provided for the arbitration of disputes arising from or related to a Compensation and Governance Agreement and a related Arrangement Agreement. The respondents launched an oppression remedy application in the courts; this was met with a stay application under article 8 of the Model Law. In erroneously dismissing the application, the first instance judge proceeded to determine whether the "primary issue" in the case was within the exclusive jurisdiction of the arbitrator; he concluded on a balance of probabilities that the "gist" of the claim went well beyond the scope of the arbitration agreement. Similar to the reasoning of the Ontario Court of Appeal in *Finkelstein* (above), he also reasoned that inasmuch as the arbitrator was not clothed with any "special expertise" to consider the jurisdictional issue, the court was best-suited to decide that question.

Consistent with *Dell* and *Seidel*, the New Brunswick Court of Appeal reversed this decision on the following bases. First, it drew a distinction between determining whether an arbitrator has <u>any</u> jurisdiction and, if so, the scope of that jurisdiction. In the latter event, where the Model Law applies, principles enunciated in *Dalimpex* and *Dell* compelled the adoption of a "*prima facie*" or "arguable" test, consistent with the appropriate deferential approach to arbitration. The motion judge erred by requiring the moving party to prove on a balance of probabilities that the arbitration agreement had been breached. In the result, the appeal court concluded that the oppression allegations were *prima facie* contemplated by the language of the Arrangement Agreement such that, for at least some of the claims, the arbitration agreement applied. Consistent with the Model Law and *competence-competence*, the court oppression remedy application was stayed, the arbitrator was to then determine the extent of his jurisdiction, and any matters not properly subject to arbitration could be dealt with by the courts after conclusion of the arbitration.

As with any legal doctrine, no matter how clearly stated, there will always be instances where courts pay lip service to the principle and then derogate therefrom. To repeat a point made above, the quality and correctness of decisions on these issues

[39] *Harrison v. UBS Holding Canada Ltd.*, 2014 NBCA 26.

will always be dependent upon the quality, experience, and expertise of counsel and judges. The recent Ontario decision in *Graves v. Correactology Health Care Group Inc.*[40] exemplifies this observation. There, applicants seeking a stay of court proceedings in favour of arbitration argued that they were not signatories to the material arbitration agreement and that, in any event, the commercial agreement which contained the arbitration clause was void as having been induced as part of a fraudulent scheme. The application judge cited *Dell* and other authorities to similar effect, but then dismissed the stay application on the bases that: (i) it was clear that the plaintiffs were not parties to the agreements in issue, such that they should not be allowed to use arbitration as a shield to court action; and, (ii) it was clear that the scope of the arbitration agreement did not include fraud claims. At paragraph 65:

> In summary, the arbitration clauses in the Enrollment Agreement and the License Agreement are ambiguous and do not indicate a clear intent to refer all disputes arising under those agreements to arbitration. In addition, the individual defendants and the Association are not parties to those agreements and cannot rely upon the arbitration clauses to seek a stay. Even if the arbitration clauses were binding, the Plaintiffs raise serious allegations of a fraudulent scheme that would fall outside their scope. Moreover, because the allegations bring into question the Defendants' business and the agreements themselves, there is a serious issue as to the validity of the arbitration clauses. A partial stay would not be reasonable in the circumstances.

There are several bases upon which this case can be criticized, and to the extent that it in effect ignored the precepts of *Dell* and the principle of the autonomy of arbitration agreements, it was incorrectly decided. It may often be the case that whether a putative party is privy to an arbitration agreement can be determined on a superficial basis; but it often will not be. That type of determination may well invoke some need to review relevant evidence in order to determine, for example, whether doctrines of agency, piercing

[40] *Graves v. Correactology Health Care Group Inc.*, 2018 ONSC 4263 [*Correactology*].

the corporate veil, or "group of companies doctrine" may apply.[41] Equally, it is hard to imagine that it was obvious from a superficial review of the evidence that the claims advanced were clearly outside the scope of the arbitration agreement. Finally, the *Correactology* Court was either not made aware of the important arbitration principle that arbitration clauses are separable from the contracts in which they are placed, or it chose to ignore that important principle.

Perhaps of greater significance is the recent problematic decision in *Heller v. Uber Technologies Inc.*[42] In that class proceeding, the plaintiff, an Uber Eats driver, sought declaratory relief that he and fellow drivers were Uber employees and thus entitled to the benefits of Ontario's labour standards legislation. The material contracts, which were accepted by drivers through the Uber website, were stated to be governed by the laws of The Netherlands and contained mandatory International Chamber of Commerce (ICC) mediation and arbitration clauses that ultimately required ICC arbitration in The Netherlands. The U.S.-based defendants moved to stay the class proceeding. The first instance judge ruled that Ontario's international commercial arbitration statute applied, subject to the arbitrator's ultimate ruling on that issue. The motion judge then, adopting the *Dell* and *Seidel* methodology, applied *competence-competence* and dismissed the stay application and remitted questions of jurisdiction to the arbitrator. In his decision, the application judge noted that the possible application of the labour standards statute was complex and that it required a non-superficial review of the evidence.

Regrettably, while there were certainly valid and tenable grounds upon which to reverse that decision and refuse the requested stay, the Ontario Court of Appeal did so by misapplying (or erroneously applying) certain important arbitration law principles, including *competence-competence*. As to *competence-competence* and jurisdiction, Nordheimer J (writing for the unanimous court) characterized the key issue in the underlying case as determining whether the

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[41] This is exemplified by *Xerox Canada Ltd. v. MPI Technologies Inc.*, [2006] OJ No 4895 (Ont SCJ), in which the court sustained a tribunal decision that applied the group of companies doctrine do allow a non-signatory status as a claimant in the arbitration.

[42] *Heller v. Uber Technologies Inc.* 2018 ONSC 718, rev'd 2019 ONCA 1.

agreements between the class members and Uber were invalid as attempts to illegally contract out of Ontario's labour standards statute. For this purpose, he assumed that the plaintiff and putative class members were employees and he then invoked the exceptions in section 7 of Ontario's domestic arbitration statute as the basis for exercising discretion to refuse the stay.[43] Justice Nordheimer noted Uber's argument that the issue before the Court was one of jurisdiction, and that by invoking *competence-competence* the question should be remitted to an arbitral tribunal. He disagreed in the following terms:[44]

> I do not agree with Uber's position because, in my view, this issue is not about jurisdiction. I am aware of the general approach that any dispute over an arbitrator's jurisdiction should first be determined by the arbitrator but that addresses situations where the scope of the arbitration is at issue. That is not this case. There does not appear to be any dispute that, if the Arbitration Clause is valid, the appellant's claim would fall within it. Rather, the issue here is the validity of the Arbitration Clause. The answer to that question is one for the court to determine as s. 7(2) of the *Arbitration Act*, 1991 makes clear.[45]
>
> In light of that conclusion, the competence-competence principle has no application to this case and, consequently, I do not need to address the arguments made with respect to it.

With respect, this departs from *Dell* and *Seidel* and is incorrect. While it was certainly true that the precise issue before the court was the validity of the driver contracts and, perforce, the arbitration agreements within those contracts, *competence-competence* is not limited to questions of scope of arbitral agreements. It extends to the validity of arbitration agreements as well. The jurisdictional

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[43] Nordheimer JA was indifferent as to whether the case was international or domestic, as (in his view) Model Law article 8 and section 17 of the domestic arbitration act are substantially the same.

[44] *Heller v. Uber Technologies Inc*., 2019 ONCA 1 at paras 39-40.

[45] Section 7(2) of Ontario's domestic arbitration act provides that the court "may" refuse to stay a proceeding if the "arbitration agreement is invalid".

question before the Court was categorically a question of mixed fact and law- one that was dependent upon a myriad of facts and one that was not determinable on a superficial review of the evidence, and certainly it was erroneous for the Court to presume, as a starting point, that the drivers were in fact employees. On this basis, and but for the alternative reasons for decision based upon the court-accepted unconscionability of the agreement and concomitant public policy grounds, litigation should have been stayed in favour of jurisdiction determinations by an arbitral tribunal.

At worst, and unless the *competence-competence* aspect of *Uber* is reversed by the SCC (leave to appeal to that court having been granted), the case stands as an aberrant treatment of the doctrine by an appellate court obviously concerned by the apparent inequity (if not unconscionability) of a large multi-national corporation forcing uneconomic arbitration procedures upon putative low-paid employees. The decision does not negate or detract from the force of the *Dell* and *Seidel* decisions, or the several cases on this issue decided since 2007 and 2011.

IV. CONCLUSION

As demonstrated above, the positive aspect of *competence-competence* has been ubiquitously expressly adopted in Canadian arbitration legislation. This is consistent with arbitration legislation in most states, with the notable exception of the United States. As to the negative aspect of *competence-competence*, Canadian courts historically, and particularly after the adoption of the Model Law in 1985, generally applied the principle by remitting jurisdictional questions (even those that related to the existence of arbitration agreements) to arbitral tribunals. The SCC recognized and gave full effect to *competence-competence* and provided clarity to the balancing of the roles of the courts and arbitral tribunals by articulating the protocol first described in *Dell* and then confirmed on a national scale in *Seidel*. The said protocol has provided clarity and has not diminished the role of arbitrators in Canada.

The broader significance of *Dell*, *Seidel* and the cases that followed them is reflected in the SCC's recent decision in *Telus Communications Inc. v. Wellman*.[46] In that case, the court had to

[46] *TELUS Communications Inc. v. Wellman*, 2019 SCC 19.

determine whether non-consumer claims in a class action could proceed to arbitration where consumer claims in that same proceeding were barred by statute. In the result, the majority ruled that the court did not have discretion to stay the non-consumer claims. In dealing with the issues in the case, the majority took the opportunity to make and repeat important statements reflective of the Court's profound support for commercial arbitration, including that: (i) Canadian courts' hostility to arbitration was at an end; (ii) parties must abide by their arbitration agreements; (iii) staying court proceedings gives effect to the policy that parties should abide by their arbitration agreements; (iv) the concept of party autonomy supports the broad principle that parties are free to craft their own dispute resolution mechanisms; (v) courts must show due respect for arbitration agreements and more broadly commercial arbitration itself; and, (vi) court intervention into arbitration matters is, as a matter of fundamental principle, limited.[47] The majority concluded this review of arbitration policy with the following:[48]

> Stated succinctly, s. 6 signals that courts are generally to take a "hands off" approach to matters governed by the Arbitration Act. This is "in keeping with the modern approach that sees arbitration as an autonomous, self-contained, self-sufficient process pursuant to which the parties agree to have their disputes resolved by an arbitrator, not by the courts" (*Inforica Inc. v. CGI Information Systems and Management Consultants Inc.,* 2009 ONCA 642 (CanLII), 97 O.R. (3d) 161, at para. 14)

As Professor Bachand correctly observed,[49] Canadian courts do show a real commitment to make arbitration work and they have confirmed, as a matter of public policy, that they will no longer guard their own role to the detriment of a viable arbitration regime. Canada remains an arbitration-friendly state, with arbitration having the full support of its courts.

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[47] See *ibid* at paras 48-55.

[48] *Ibid* at para 56.

[49] See *supra* note 35b.